

EXHIBIT E

Detroit Free Press

A GANNETT COMPANY

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Herschel P. Fink
Legal Counsel

March 15, 2013

Director
Office of Information Policy
United States Department of Justice
Suite 11050
1425 New York Avenue, NW
Washington, D.C. 20530-0001

**Re: Freedom of Information Act
Request No. 2013 USMS 22859
Subject: Several Booking Photographs**

Freedom of Information/Privacy Act Appeal

Dear Director:

This is an appeal from the February 14, 2013 denial by the Marshals Service (William E. Bordley, associate general counsel/FOIPA Officer, Office of General Counsel) of a Freedom of Information Act request by my client, Detroit Free Press, Inc. on February 12, 2013 for booking photographs of three individuals who were then (and are currently) the subjects of federal criminal prosecutions in the Eastern District of Michigan: Kwame Kilpatrick, Bernard Kilpatrick and Bobby Ferguson. Each man is a defendant in an ongoing criminal proceeding, in which that defendant's name has already been divulged, and in which he has already appeared in open court. As such, each defendant clearly meets the requirements set forth in *Detroit Free Press v Department of Justice*, 73 F.3d 93 (6th Cir. 1996), *reh'g denied*, 1996 U.S. App. LEXIS 8867 ("*Detroit Free Press I*"), in which the Sixth Circuit clearly stated that "no privacy rights are implicated [by disclosure of booking photographs]." 73 F.3d at 97.

Notwithstanding this binding precedent within the Sixth Circuit, Mr. Bordley rejected the subject request, stating: "You have not identified any public interest recognized under the FOIA that would be served by release of the mug shot(s) and that would justify invading personal privacy. See, *U.S. Department of Justice v Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989)."

Mr. Bordley's rejection is apparently prompted by a new "Booking Photograph Disclosure Policy" issued on December 12, 2012 by Gerald M. Auerbach, general counsel of the Marshals Service. Mr. Auerbach states in this new policy that, "once a prisoner has been arrested, the general rule is that no release should be made because booking photographs of that prisoner to the media would not serve law enforcement purposes."

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Specific to *Free Press I*, Mr. Auerbach continued:

Until now, the USMS has employed an exception for FOIA requests originating within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit to accommodate that court's decision that "no privacy rights are implicated" by the booking photographs of a criminal defendant who has been publically [sic] named, who has "appeared in open court," and who has an "ongoing criminal proceeding." See *Detroit Free Press, Inc. v Dep't of Justice*, 73 F.3d 93, 95, 97 (6th Cir. 1996) (declining to address whether a privacy interest exists in cases "involving dismissed charges, acquittals, or completed criminal proceedings").

In light of the weight of legal precedent now supporting the Department of Justice's conclusion that booking photographs generally should not be disclosed under the FOIA (referencing a 10th and an 11th Circuit opinion), the Department has decided that a uniform policy should be applied. Accordingly, effective immediately, the USMS will not disclose booking photographs under the FOIA, regardless of where the FOIA request originated...."

Rather ambiguously, Mr. Auerbach then concludes his new policy by saying that the USMS will not disclose booking photographs "...unless...other factors specific to the particular FOIA request warrant processing that request consistent with existing Sixth Circuit precedent." Of course, "existing Sixth Circuit precedent" requires disclosure "in an ongoing criminal proceeding, in which the names of the defendants have already been divulged and in which the defendants themselves have already appeared in court..." 73 F.3d at 97. The subjects of the current request, including the former mayor of the City of Detroit, who are all accused of racketeering, bribery and other acts of public corruption, certainly fit the Sixth Circuit's requirements for disclosure. Nevertheless, based upon the Marshals Service's rejection of this request, it is obvious that the final phrase of the December 12, 2012 policy has no significance.

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The purpose of this appeal is two-fold. It is first to inquire under what authority the Marshals Service relies to impose 10th and 11th Circuit law upon the Sixth Circuit, which has spoken clearly and decisively on this issue? But, secondly, it is to call your attention to a fact that you may be personally unaware: This is not the first time that the Marshals Service has unilaterally decided that enough time had passed that it could safely ignore *Detroit Free Press I*, or that subsequent cases had somehow given it license to do so.

In May, 2004 the Marshals Service - - perhaps believing that after almost a decade the coast was clear to ignore *Detroit Free Press I*, issued a new policy, similar to the December 2012 policy that is involved here, seizing upon a then recent Supreme Court decision in *NARA v Favish*, 124 S.Ct. 1570 (2004), to declare that “Favish now seriously calls into question the continued vitality of the Sixth Circuit’s singular view of an individual’s privacy interest as enunciated by a divided panel in *Detroit Free Press v Department of Justice*, a case involving the disclosure of ‘mug shots.’ *** Thus, in light of the *Favish* decision, atop the overwhelming weight of case law broadly interpreting Exemption 7(C)’s privacy protection, *Detroit Free Press* should no longer be regarded as authoritative even within the Sixth Circuit.”

The Free Press, which has as its front page motto, “On Guard for 181 Years,” sued the Marshals Service once again. *Detroit Free Press, Inc. v United States Department of Justice*, U.S. District Court for the Eastern District of Michigan, Case No. 05-CV-71601 (*Detroit Free Press II*). [Relevant pleadings are Attachment A.)

This time your service, quickly recognizing that it had no defense, abruptly reversed course, announced it would resume honoring mug shot requests in the Sixth Circuit, and moved for dismissal of *Detroit Free Press II* as moot. U. S. District Judge Anna Diggs Taylor - - who had also presided over *Detroit Free Press I* - - was not amused. She granted the motion to dismiss, but sanctioned the DOJ with an attorney fee award in favor of the Free Press. (Attachment B.)

About the same time, the Akron Beacon Journal newspaper also sued the DOJ in the Northern District of Ohio for similarly denying its mug shot request. District Judge David Dowd noted in his opinion rejecting dismissal for mootness that, “Defendants initially contended that *Detroit Free Press* either did not apply in this case or was no longer good law. They have since ‘recognize[d] that they are bound by the decision as law of this circuit.’ Consequently,

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Defendants indicated they would provide the requested booking photographs to Plaintiff.” The Court then found in favor of the newspaper, and also awarded it attorney fees. (Attachment C.)

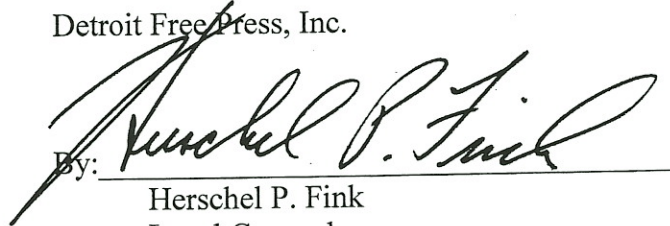
Now, with the passage of another seven years, the Marshals Service apparently believes the time is once again ripe to ridicule the Sixth Circuit’s “singular view,” and to claim that - - once again - - “the weight of legal precedent” (but not in the Sixth Circuit) allows it to ignore *Detroit Free Press I* and now *Detroit Free Press II*.

But, nothing has changed. Indeed, in addition to *Detroit Free Press I* and *II*, and *The Beacon Journal Publishing Co. v DOJ*, the Sixth Circuit itself in 2007 reaffirmed the principle that, “As a matter of federal constitutional law, a criminal suspect does not have a right to keep her mug shot and the information contained in a police report outside of the public domain - - and least of all from legitimate requests for information from the press.” *Bailey v City of Port Huron*, 507 F.3d 364, 368 (6th Cir. 2007), affirming 2006 WL 2811271 (E. D. Mich.) (“As provided by the above case law, release by the Defendants of plaintiff’s mug shot does not implicate any of the right of privacy theories.” (Slip Opinion at 3.)

The Free Press sued the Marshals Service in 1994 and in 2005 to vindicate its right of access under FOIA to criminal defendants’ booking photos. (The undersigned represented the Free Press in both cases.) The newspaper intends to continue seeking access to such public records in this case. It is the newspaper’s hope, however, that the Marshals Service will reconsider its December 2012 policy change, and the denials in this case, and that there will be no need for a *Detroit Free Press III*.

Very truly yours,

Detroit Free Press, Inc.

By: 
Herschel P. Fink
Legal Counsel